ORIGINAL

ROBERT J. ABBOTT
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CAPE CANAVERAL, FL.
32920

30 April, 1996

OFFICE OF THE SECRETARY
William F. Canton, Acting Secretary
FEDERAL COMMUNICATIONS COMMISSION
1919 M Street, N.W.
Washington, D.C. 20054

REPLY COMMENTS TO REPORT AND ORDER FURTHER NOTICE OF PROPOSED RULE MAKING, **Par 55 through 62**, 29 February, 1996, FCC 95-180, IB Docket 95-59, DA 91-577, 45-DSS-MISC- 93. Preemption of Local Zoning Regulation of Satellite Earth Stations.

The Undersigned respectfully submits the following reply comments:

Paragraph 55: The Commission should expressly articulate the intent of Congress into the body of the final order so as to prevent any reader, including the judiciary, from misinterpreting, fragmenting or misconstruing the Order's objectives, exceptions and waivers.

Paragraph 56-57: Regarding the placement of C-Band Antenna's: C-Band antenna opponents have wildly speculated, hypothesized, dreamed-up and opined various *unsafe* configurations or installations, but have yet to document or substantiate even one recorded case history where allegedly unsafe installations of C-Band satellite antennas caused injury or loss of life from severe weather or hurricane. see **Abbott v. City of Cape Canaveral**[1] 840 F. Supp. 880 (M.D. Fla. 1994) @ 880 #8 Zoning and Planning.

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[1] **Abbott v. City of Cape Canaveral** 840 F. Supp. 880 (M.D. Fla. 1994) Affirmed on Appeal, 41 Fed. Rep. 3d. 668 (11 Cir. 1994)

In applying the courts "rationale" in **Abbott**, their basis for prohibition of C-Band antenna installations would now apply to all citizens residing in "hurricane sensitive" areas which extend from Texas to Florida on the gulf coast and up the Atlantic seaboard into the Carolina's. Furthermore the court erroneous presumed that it is technically impossible to engineer and construct a severe weather C-Band antenna installation. The door is now open to apply this absurd reasoning to eliminate all C-Band installations in the "tornado sensitive" areas of the midwest. The **Abbott** court failed to take judicial notice that the **National Hurricane Center** in Miami, Florida, has a C-Band (up-link) antenna mounted on its roof, that operated undamaged through Hurricane Andrew.

C-Band Opponents have yet to substantiate their aesthetic concerns that property values have declined in those neighborhoods where C-Band antenna's are installed or that C-Band installations have caused neighborhoods to fall into ***urban decay and abandonment***. Two houses I've sold in California and Florida found home buyers requesting that C-Band antennas remain in place after the sale. When I removed it, the Realtor installed her own antenna to sell the house.

The Commission should expressly and narrowly define the terms "health and safety and aesthetic objectives" **in the CFR,** to prevent the judiciary from again using this rationale as a pretextual basis for blanket prohibitions. The C-Band direct to home industry requires the Commission's affirmative support.

Paragraph 57- 60: While it is true that Congress remained silent on treatment of C-Band/V-Sat services in 207, the Commission should use its congressionally vested authority to promote competition and equal treatment of

these (larger) antenna technologies and to promote an evolution of C-Band/V-Sat applications for apartment and condominium dwellers using flat plate[2] technology. If the satellite industry is to remain committed to these applications in an international/global competitive marketplace, then these technologies should be utilized in future domestic Atlantic and Pacific coastal communications markets. Please take notice that in **Abbott** the court decided that cable (32 channels) and over the air television (4 channels) were a sufficient substitute for C-Band's 250 channels and applied its scholarly reasoning, without citing any authority except that of the city's "expert antenna salesman", and concluding that I was not *entitled* to receive **international programming** from INTELSAT or TDRSS because it was not *intended* for me to receive it[3].

Paragraph 61- 62: The Commission should avoid vague or debatable language. I recommend that the language in proposed paragraph (f): "to the extent it impairs" be changed to "prevents or impairs....because the federal interest at stake here is very significant." This would prevent local government or homeowner association "experts" from subjectively determining a viewer's picture **quality** or the **extent of access** to satellite programming.

Respectfully submitted,

Robert J. Abbott

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[2]Flat plate antennas are also known as "phased array" or "electronically steered" antenna's

[3]**Abbott v. City of Cape Canaveral** 840 F. Supp. 880 M.D. Fla. (1994), Affirmed 41 F.3d 669 (11 Cir. 1994) @ 885

Robert J. ABBOTT, Plaintiff,

v.

CITY OF CAPE CANAVERAL & Code Enforcement Board of the City of Cape Canaveral, Defendants.

No. 92-1113-CIV-ORL-18.

United States District Court,
M.D. Florida,
Orlando Division.

Jan. 5, 1994.

Satellite dish owner brought action challenging municipal ordinance regulating placement of satellite dishes. The District Court, G. Kendall Sharp, J., held that: (1) ordinance was not preempted by FCC regulation; (2) ordinance did not violate owner's First Amendment rights; (3) ordinance did not violate owner's substantive due process rights; and (4) ordinance did not violate equal protection guarantees.

Judgment for municipality.

1. Zoning and Planning ⇐14

Municipal ordinance regulating satellite dishes had reasonable and clearly defined health, safety or aesthetic objective, for purposes of Federal Communications Commission (FCC) regulation which preempted local zoning ordinances differentiating between satellite antenna facilities unless certain conditions were met; preamble of ordinance's enacting ordinance emphasized concern with public safety and community aesthetics, and stressed difference in appearance between satellite dish antenna and dipole antenna.

2. Zoning and Planning ⇐14

Municipal ordinance regulating satellite dishes did not unreasonably limit or prevent owner of satellite dish from receiving signals transmitted by satellites, for purposes of Federal Communications Commission (FCC) regulation which preempted local zoning ordinances differentiating between satellite antenna facilities unless certain conditions were met; local ordinance permitted owner to receive all satellite transmissions intended for North American audiences.

3. Zoning and Planning ⇐14

Costs necessary for satellite dish owner to comply with municipal ordinance regulating satellite dishes were not excessive, so as to cause ordinance to be preempted by Federal Communications Commission (FCC) regulation; $400 cost of compliance was not unreasonable in light of purchase and installation costs totalling $2,150.

4. Constitutional Law ⇐90(3)

Courts will uphold content-neutral ordinance which furthers substantial government interest and does not unreasonably limit alternative avenues of communication. U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇐90.1(9)
Zoning and Planning ⇐76

Municipal ordinance regulating satellite dishes did not violate satellite dish owner's First Amendment rights; ordinance served substantial government interest of health and safety of people in community and aesthetic values of community, and ordinance did not unreasonably limit alternative avenues of communication, since owner could receive satellites intended for his location, owner could subscribe to cable television if he wished, and owner had regular dipole antenna installed. U.S.C.A. Const.Amend. 1.

6. Constitutional Law ⇐278.2(1)
Zoning and Planning ⇐76

Municipal ordinance regulating satellite dishes did not violate satellite dish owner's right to substantive due process; ordinance was rationally related to legitimate government objectives of health, safety and aesthetics. U.S.C.A. Const.Amend. 5.

7. Telecommunications ⇐449.20

Right to receive television programming through satellite dish is not absolute.

8. Constitutional Law ⇐228.2
Zoning and Planning ⇐76

Municipal ordinance which regulated satellite receive-only antennas but not other types of antenna facilities did not violate equal protection guarantees; municipality

had legitimate interest in objectives of health, safety, and aesthetics, particularly because municipality was located in hurricane sensitive area, and local ordinance was reasonably related to those goals. U.S.C.A. Const.Amend. 14.

Robert Kimbark Lee, Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Orlando, FL, for plaintiff.

Michael J. Roper, Dean, Ringers, Morgan and Lawton, P.A., Orlando, FL, for defendants.

ORDER

G. KENDALL SHARP, District Judge.

Robert J. Abbott (Abbott) brings this action against the City of Cape Canaveral (Cape Canaveral) and the Code Enforcement Board of the City of Cape Canaveral (Board) claiming Federal Communications Commission (FCC) Preemption and alleging violations of the First and Fourteenth Amendments, due process, equal protection, and 42 U.S.C. §§ 1983 and 1988. This case was tried without a jury. The issues before the court are whether 47 CFR § 25.104 preempts section 641.61 of Cape Canaveral's zoning ordinance and whether the local ordinance violates Abbott's constitutional rights under the First Amendment and to due process and equal protection. The court concludes that 47 CFR § 25.104 does not preempt section 641.61 of Cape Canaveral's zoning ordinance. The court further finds that neither Cape Canaveral nor the Board violated Abbott's constitutional rights. In accordance with Federal Rule of Civil Procedure 52(a), the court enters this order.

I. Findings of Fact

A. Installation of Abbott's Satellite Dish Antenna

Abbott, a NASA aerospace engineer, owns and occupies a residence located 414 Jackson Avenue, Cape Canaveral, Florida. Abbott initially moved to Cape Canaveral in 1981. In 1984, Abbott purchased and installed a satellite television "receive only" dish antenna at his Cape Canaveral residence. Abbott paid $1254.95 for the satellite system which consisted of a twelve foot satellite dish, low noise amplifier, satellite receiver, and polarizer. The satellite dish was mounted on the west side of Abbott's residence on a three inch pipe anchored to a concrete filled block wall at a height of approximately twenty-one feet. (Doc. 37, ¶¶ 7, 8.) The satellite dish has a horizon to horizon mount. Abbott's residence is located in a district zoned medium density residential (R–2). At the time Abbott installed the satellite dish, Cape Canaveral did not have an ordinance restricting or regulating the installation of satellite dish antennas in the zoning district where Abbott lives.

In 1985, Abbott moved to California. During the time that Abbott lived in California, Abbott retained his Cape Canaveral residence. In 1987, Abbott took down the satellite dish at his Cape Canaveral residence and placed it in storage. In 1990, Abbott purchased a communications receiver, which cost $895.00. Abbott initially returned to Cape Canaveral in March 1992 and permanently returned to Cape Canaveral in April 1992.

B. Regulation of Satellite Dishes

While Abbott was living in California, Cape Canaveral enacted an ordinance pertaining to satellite dishes. The local ordinance at issue, section 641.61, provides in pertinent part:

> A. No owner, occupant or tenant of any property located within any zoning classification shall erect, construct or install any earth station antenna or satellite dish antenna without first obtaining all necessary permits from the Building Official.
>
> ....
>
> D. No earth station antenna shall be mounted onto the top or side of any single family building, duplex or triplex.
>
> ....
>
> G. In all zones, ground mounted earth station antennas shall be erected at the minimum height which allows satellite reception, not to exceed seven (7) feet in R–1 and R–2 zones, and twenty-two (22) feet in all other zones. Said measurement shall be calculated from the established grade to the dish center.

Abbott testified that in or about March 1992, after he learned that Cape Canaveral had enacted the ordinance pertaining to satellite dishes, Abbott met with the City Building Official, James E. Morgan (Morgan), and advised Morgan that he intended to reinstall the satellite dish at the same location where the satellite dish was previously mounted. Abbott testified that he thought his use of the satellite dish was "grandfathered in" with the new ordinance. According to Abbott, approximately one month later, Morgan told Abbott that Abbott could reinstall the satellite dish. After Abbott reinstalled the satellite dish, Cape Canaveral Code Enforcement Officer Thomas B. Kleving (Kleving) issued Abbott a notice dated July 1, 1992 which directed Abbott to stop installation of the satellite dish antenna located at Abbott's residence until such time as Abbott complied with Cape Canaveral's building regulations. (Pl.'s Ex. 6.) Abbott testified that after he received the stop notice, he spoke with both Morgan and Kleving regarding the matter and Abbott's contention that Morgan had advised Abbott that Abbott could install the satellite dish on top of Abbott's house. However, Morgan testified that there was a misunderstanding between Abbott and himself regarding the grandfathering status of Abbott's use of the satellite dish because Morgan was unaware that the satellite dish had been removed for over four years.

Subsequently, Kleving issued Abbott a Notice of Ordinance/Code Violation which informed Abbott that he was in violation of Cape Canaveral's Earth Station Antenna Regulations, in particular, section 641.61(A), (D), and (G). (Pl.'s Ex. 7.) The notice required Abbott to take corrective action to remedy the violation by August 13, 1992. The notice further provided that if the violation continued beyond the correction date or reoccurred, the Code Inspector would notify the Board and request a hearing. Abbott initially appeared before the Board on August 20, 1992. However, the Board continued the matter until the scheduled September meeting. The September meeting resulted in the Board finding that Abbott had violated section 641.61, paragraphs (A), (D), and (G) of Cape Canaveral's zoning regulations. (Pl.'s Ex. 13.) Further, the Board ordered Abbott to comply with section 641.61 on or before October 20, 1992, by detaching his antenna from his residence and reinstalling the antenna to conform with Cape Canaveral's regulations. (Pl.'s Ex. 13.) According to the Board's Compliance Order, if Abbott did not comply with the Order or if the violation reoccurred Abbott would incur fines. (Pl.'s Ex. 13.)

In a letter dated October 8, 1992, Abbott sought a waiver of fines while he pursued his legal remedies. (Pl.'s Ex. 14.) On October 22, 1992, the Board denied Abbott's request for a waiver of fines. On October 23, 1992, Abbott removed his satellite dish from the mount on the side of his residence. In December 1992, Abbott filed this suit. Abbott did not seek a variance at any time.

Abbott maintains that the costs associated with compliance with the local ordinance include approximately $400.00 for fencing, $400.00 for reinstallation of pole and concrete foundation, $400.00 for engineer approved drawings, and $200.00 for electrical installation.

C. *Range of Channels and Programming Available*

Abbott testified at trial that he purchased the satellite dish because of the magnitude of channels and variety of programming available through satellite systems as compared to the range of channels and programming local television stations and cable companies provide. Abbott stated that he is interested in receiving programming such as United States Information Agency, PBS, and other educational programs as well as programming related to socio-political issues. In addition, Abbott seeks to receive NASA science and technology programs. According to Abbott, the types of programming Abbott received in 1984 included PBS, sports, news uplink broadcast, and foreign language broadcasts from Canada and Mexico.

Abbott's expert at trial, Richard W. Towers (Towers), testified that he tested four locations on Abbott's property to determine whether Abbott could install his satellite dish in compliance with the local ordinance and obtain all the satellites Abbott desired. Tow-

ers testified that no place exists on Abbott's property in which to install the satellite dish to enable Abbott to receive all the satellites available to him without violating the local ordinance. According to Towers, four of the Western or North American satellites are partially obstructed and the Eastern satellites are completely obstructed.

Towers testified that approximately 75 satellites are viewable from Cape Canaveral. According to Towers, the North American satellites are generally located on an arc between 149 degrees west and 41 degrees west and consist of United States satellites as well as five international satellites. Towers stated that the international satellites are not intended for the continental United States but that the United States receives transmissions from these satellites. Towers also testified that some satellites in the middle of range 9 degrees west and 41 degrees west are intended for the United States.

Towers admitted on cross-examination that the North American satellites generally fall within the range 137 degrees west and 69 degrees west, however, Towers maintained that some of the North American satellites are beyond 69 degrees west. Further, Towers' testimony shows that although Towers thought there was some obstruction of the satellite Satcom 2, he could not quantify any obstruction; that at the time of his deposition he stated that Satcom 2 was unobstructed; that in the range between 137 degrees west and 69 degrees west, only two satellites had any obstruction; that the satellite TDRS located at 149.8 degrees west is not a commercial satellite but instead a government satellite; and that the satellite Aurora 2 located at 139 degrees west serves mostly Alaska and Hawaii and is not intended for viewing in the southern United States. According to Towers, approximately 230 channels are available to Abbott unobstructed with the satellite dish located on the ground. As to particular programs Abbott seeks to view, Towers testified that SCOLA, CNN, and PBS are available on satellites which Abbott receives unobstructed.

Cape Canaveral and the Board presented the testimony of Thomas J. Ferrari (Ferrari) as an expert on their behalf According to Ferrari, the satellites generally considered available to North American audiences are satellites located within the range 137 degrees west through 69 degrees west and are commonly referred to as the North American satellites.

Ferrari testified that he conducted a site survey of Abbott's residence to determine whether Abbott's satellite antenna could receive all the intended satellites with the satellite dish placed on the ground. In conducting the site survey, Ferrari used a site survey tool, which Ferrari described as a combination compass and viewfinder to determine whether there were any obstructions to satellites on Abbott's property. Ferrari testified that he surveyed three locations within Abbott's property and found that the optimal placement for the satellite dish was the second location tested in Abbott's west yard. Ferrari testified that according to the results of his site survey, Abbott can receive all the satellites intended for North American audiences. Ferrari stated further that Abbott cannot receive the Eastern Satellites because these satellites are not intended for North American audiences.

Ferrari testified that the fence on the west side of Abbott's property did not cause much, if any, blockage of signals. Further, even assuming a partial blockage of two to three feet of the satellite dish, Ferrari testified that the blockage would effect the signal level only to a small degree and that any change in quality of the picture would not be visibly noticeable. According to Ferrari, a satellite dish does not need to be entirely unobstructed to receive quality reception. Ferrari testified that even assuming a 10 to 20 percent blockage of the satellite dish, no noticeable difference in quality of picture is visible to the naked eye. According to Ferrari, partial blockage of a satellite antenna does not affect the quality of the picture visible to a customer because a parabolic antenna receives signals from all over the dish which reflect to the centerpoint where the feed horn is located. Thus, even if a satellite dish is partially blocked, a significant area of the satellite dish collects enough signals to generate a good picture.

Ferrari testified that Abbott would have approximately 250 channels available to him on C–Band within the range of satellites 137 degrees west and 69 degrees west. Ferrari testified that Abbott can receive CNN, PBS, and SCOLA with the satellite dish installed in the west yard as well as receive all channels that are received and then rebroadcast by local cable television companies.

II. Conclusions of Law

A. *FCC Preemption*

In 1986, the FCC promulgated a regulation which preempts local zoning ordinances that differentiate between satellite antenna facilities. This regulation provides, in pertinent part:

> State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:
>
> (a) Have a reasonable and clearly defined health, safety or aesthetic objective; and
>
> (b) Do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.

47 CFR § 25.104 (1992).

The parties stipulated that section 641.61 of Cape Canaveral's zoning regulations applies only to satellite antennas and not to other types of antenna facilities which receive communications from earth-based transmitters, such as conventional television antennas or ham radio antennas. Thus, because the local ordinance differentiates between satellite receive-only antennas and other types of antennas, the local ordinance must satisfy both subsections of the FCC regulation to avoid preemption.

1. Reasonable and Clearly Defined Health, Safety, or Aesthetic Objective.

[1] Abbott claims that local ordinance section 641.61 does not set forth a health, safety, or aesthetic objective, or in the alternative, that ordinance number 48–85 fails to justify a differentiation in treatment between receive-only satellite antennas and other antennas, and thus, the FCC regulation preempts the local ordinance. However, Cape Canaveral and the Board contend that because section 641.61 was enacted by ordinance number 48–85, the preamble of the enacting ordinance must be consulted in construing section 641.61.

Ordinance number 48–85 adopted section 639.61, entitled Earth Station Antenna Regulations. (Def.'s Ex. 2.) Ordinance number 48–85 contains a preamble which emphasizes Cape Canaveral's concern with public safety and community aesthetics in regulating the installation of satellite dish antennas. (Def.'s Ex. 2.) In particular, the preamble addresses the necessity of well-defined engineering installation and fencing around the base as safety measures. Further, the preamble stresses the difference in appearance between satellite dish antenna and dipole antenna as a basis for its aesthetic concerns. Although ordinance number 4–89 amended ordinance number 48–85, the amending ordinance merely renumbered section 639.61 to section 641.61. (Def.'s Ex. 3.) The amending ordinance did not alter any wording in the section. Thus, the court finds that because the preamble contains the required objectives, local ordinance 641.61 satisfies 47 CFR § 25.104(a). *See Cawley v. City of Port Jervis*, 753 F.Supp. 128, 131–32 (S.D.N.Y. 1990) (finding that health, safety or aesthetic objectives must be expressly articulated in the ordinance itself or in accompanying regulations); *cf. Van Meter v. Township of Maplewood*, 696 F.Supp. 1024, 1029 (D.N.J.1988) (finding that although ordinance did not explicitly state its purposes, the purposes were inferable from the ordinance). *But see Kessler v. Town of Niskayuna*, 774 F.Supp. 711, 715 (N.D.N.Y.1991) (stating that the FCC's clearly defined objective rule requires a local government to state why its ordinance differentiates between satellite dish antenna and other types of antenna); *Village of Elm Grove v. Py*, 724 F.Supp. 612, 614 (E.D.Wis. 1989) (same).

2. Unreasonable Limitations or Prevention of Reception of Satellite Signals.

[2] Abbott contends that the local ordinance unreasonably limits or prevents recep-

tion of satellite signals transmitted by satellites. According to Abbott, the satellite dish must be installed on the top or side of his residence to obtain reasonable reception of satellite signals. Cape Canaveral and the Board argue that the local ordinance permits Abbott to receive all satellite transmissions from satellites which are intended for North American audiences. Moreover, Cape Canaveral and the Board maintain that the federal regulation contemplates that local ordinances may impose some interference as long as the ordinance does not restrict satellite reception to the degree that satellite telecommunications cannot compete with other modes of telecommunications.

Abbott seeks to receive reception of both the North American satellites and the Eastern satellites. Ferrari testified that the Eastern Satellites are not intended for North American audiences, and thus not intended for Abbott. Further, both Ferrari and Towers testified that Abbott can receive satellites located within 137 degrees west through 69 degrees west, referred to as the North American satellites, without any significant interference. According to Ferrari, Abbott has minimal blockage, if any, and that such minimal blockage would not visibly affect the quality of picture received. Because Towers did not test the particular site which Ferrari contends Abbott can receive the North American satellites and because the City and the Board provided evidence that the Eastern Satellites are not intended for North American audiences, Abbott fails to show that the local ordinance unreasonably limits or prevents reception of satellite signals. *See Van Meter*, 696 F.Supp. at 1030 (stating that the FCC Order, 51 Fed.Reg. 5519 (1986), *et seq.*, does not require a local ordinance to permit optimal placement of a satellite dish, and that the Order precludes only unreasonable interference with satellite signal reception); *see also Elm Grove*, 724 F.Supp. at 617 (noting that the FCC's policy of developing a competitive marketplace does not necessarily entitle consumers to receive every available satellite channel). Accordingly, the court finds that the local ordinance satisfies the first prong of 47 CFR § 25.-104(b).

3. Imposition of Excessive Costs.

[3] As to the imposition of costs, Abbott argues that the expenses necessary to comply with the local ordinance are excessive in light of the purchase and installation costs of Abbott's satellite dish. Specifically, Abbott testified that the costs to comply with the local ordinance approximate $1400.00. In his trial brief, Abbott calculated costs at approximately $1083.00. However, the trial brief submitted lists the following costs: $408.00 for a six foot fence; approximately $300.00 for a site plan and survey; $125.00 for engineering drawings; approximately $200.00 for electrical installation; and $50.00 for a building permit for the satellite dish. Cape Canaveral and the Board contend, however, that the costs associated in complying with section 641.61 are not unreasonable in light of Abbott's purchase and installation costs.

Towers and Ferrari do not dispute that the costs of $50.00 for a building permit and $75.00 to $150.00 for engineer approval of drawings and specifications are reasonable costs and that the cost for electrical installation is approximately $200.00. Further, Abbott admitted that he already has a fence at least six feet in height which is at least 80 percent opaque at its base. Thus, from the testimony provided at trial, the costs necessary to comply with the local ordinance are at most $400.00. Because Abbott's satellite system purchase and installation costs were $1254.95 in 1984 and $895.00 in 1985, the court finds that the costs necessary to comply with the local ordinance are not excessive in light of Abbott's purchase and installation costs. Accordingly, the local ordinance satisfies the requirements to avoid FCC preemption.

B. Abbott's Constitutional Claims

Abbott contends that section 641.61 violates his rights provided by the First and Fourteenth amendments, due process, and equal protection. In both Abbott's complaint and bench memorandum, Abbott referred only to substantive due process, and thus, Abbott does not raise a claim under procedural due process.

1. First Amendment.

[4, 5] Both parties agree that the local ordinance is content-neutral. (Doc. 61 at 16.) Courts will uphold a content-neutral ordinance which furthers a substantial governmental interest and does not unreasonably limit alternative avenues of communication. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 106 S.Ct. 925, 928, 89 L.Ed.2d 29 (1986). As noted above, the local ordinance contains reasonable and clearly defined health, safety, and aesthetic objectives. *See supra* section II.A.1. Thus, the substantial governmental interest served through the ordinance is the health and safety of the people within the community and the aesthetic values of the community. *See Johnson v. City of Pleasanton*, 982 F.2d 350, 353 (9th Cir.1992) (recognizing public safety and aesthetic values as substantial governmental interests). Further, Abbott fails to show that the ordinance unreasonably limits alternative avenues of communication. Cape Canaveral and the Board presented evidence that Abbott can receive the satellites intended for Abbott's location. Additionally, evidence was presented that cable television is an option available to Abbott but that Abbott chooses not to subscribe to cable television. Further, Abbott testified that he has a regular dipole television antenna installed. Although the First Amendment may protect the right to receive suitable access to television broadcasts, the First Amendment does not afford Abbott an absolute right to receive every satellite signal which Abbott seeks, particularly in light of a legitimate time, place, and manner restriction. *See Red Lion Broadcasting Co., Inc. v. F.C.C.*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969) (stating that "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences...."); *see also Johnson*, 982 F.2d at 353 (stating that "*Red Lion* does not stand for an absolute right to receive the maximum amount of programming feasibly accessible via satellite."); *Decker v. City of Plantation*, 706 F.Supp. 851, 854 (S.D.Fla. 1989) (noting that the First Amendment right to receive information through a satellite dish is a relative right which may be outweighed by important governmental interests, such as protection of community aesthetics). Accordingly, the court finds that the local ordinance does not violate Abbott's First Amendment rights.

2. Substantive Due Process and Equal Protection.

[6, 7] Abbott claims that the local ordinance arbitrarily, capriciously, and without rational basis, deprives Abbott of a fundamental right to receive suitable access to satellite television programming. (Doc. 61 at 18.) However, as noted above, the right to receive television programming through a satellite dish is not absolute. *See Decker*, 706 F.Supp. at 854; *see also Johnson v. City of Pleasanton*, 781 F.Supp. 632, 640 (N.D.Cal.1991) (noting that plaintiffs did not have a First Amendment right of access to the television programming of their choice), *aff'd in part, rev'd in part on other grounds*, 982 F.2d 350 (9th Cir.1992). Abbott concedes that he does not have an absolute right to any and all programming of his choice. (Doc. 61 at 18.) Although Abbott claims that the ordinance is arbitrary and capricious and without any rational basis, Abbott fails to provide evidence in support of this assertion. Furthermore, as noted above, Abbott fails to show he is unable to receive satellite transmissions intended for his location. The court finds that the ordinance is rationally related to achieve the legitimate government objectives of health, safety and aesthetics, and thus, the ordinance does not violate substantive due process.

[8] As to Abbott's equal protection claim, Abbott argues that the ordinance, as applied to him, violates his fundamental First Amendment rights. The parties stipulated that section 641.61 applies only to satellite receive-only antennas and not to other types of antenna facilities, and thus, the local ordinance treats satellite antennas differently. Because the right to receive satellite television programming of one's choice is not a fundamental right, the proper standard of review is whether the ordinance is reasonably related to a legitimate state interest. *Johnson*, 781 F.Supp. at 640 (recognizing that access to television programming of one's choice is not a fundamental right and

therefore applying a lower standard of review.) Although Abbott recognizes that Cape Canaveral advances safety and aesthetics as its goals and argues that enforcement of the ordinance is reasonably related to these goals, Abbott claims that the ordinance is arbitrary, capricious and not rationally related to the goals of safety and aesthetics. The court finds, however, that health, safety, and aesthetics are clearly legitimate governmental interests, particularly because Cape Canaveral is in a hurricane sensitive area. Furthermore, the court finds that the local ordinance is reasonably related to these legitimate governmental interests, and thus, the ordinance does not violate the equal protection clause. Because Abbott fails to show a constitutional deprivation, Abbott has no § 1983 claim remaining. *Bendiburg v. Dempsey*, 909 F.2d 463, 468 (11th Cir.1990) (stating that to maintain an action under § 1983, a plaintiff must show a deprivation of rights, privileges or immunities secured by the Constitution or laws of the United States and that conduct complained of was committed under color of state law), *cert. denied*, — U.S. —, 111 S.Ct. 2053, 114 L.Ed.2d 459 (1991).

III. Conclusion

Section 641.61 of the Cape Canaveral ordinance contains reasonable and clearly defined health, safety, and aesthetic objectives, does not impose unreasonable limitations or prevent reception of satellite signals, and does not impose excessive costs in light of the purchase and installation costs of Abbott's satellite system. Thus, 47 CFR § 25.-104 does not preempt section 641.61. Further, Abbott fails to show that the local ordinance violates his constitutional rights under the First Amendment, or to substantive due process and equal protection. Accordingly, the court rules in favor of Cape Canaveral and the Board.

It is **SO ORDERED.**

APPENDIX A

City of Cape Canaveral, Florida

Zoning Regulations

Section 641.61

A. No owner, occupant or tenant of any property located within any zoning classification shall erect, construct or install any earth station antenna or satellite dish antenna without first obtaining all necessary permits from the Building Official.

B. Prior to the issuance of any permit for the erection, construction or installation of any earth satellite antenna, the Building Official shall require an approved design placement drawing and engineering specifications, signed and sealed by an engineer licensed in the State of Florida, to meet all City and State laws and ordinances.

C. All materials that make up the installation of such antennas and supporting structures shall be of a non-corrosive material to prevent metal fatigue from maintenance neglect.

D. No earth station antenna shall be mounted onto the top or side of any single family building, duplex or triplex.

E. Earth station dish antennas shall be allowed only in the rear or side yard in all zoning districts. Placement shall not be allowed in the front yard of any lot or parcel in any zoning district. Compliance with the side setback is required. Rear setback should be complied with except when compliance prevents installation.

F. All electrical installations for the purpose of erection of antennas shall be in accordance with the National Electrical Code and all applicable City ordinances.

G. In all zones, ground mounted earth station antennas shall be erected at the minimum height which allows satellite reception, not to exceed seven (7) feet in R–1 and R–2 zones, and twenty-two (22) feet in all other zones. Said measurement shall be calculated from the established grade to the dish center.

H. The maximum outside diameter allowed for a dish receiver is ten (10) feet.

I. Only one (1) antenna shall be allowed on any lot or parcel of land.

J. Any ground placed antenna drive mechanisms, less than six (6) feet high to its lowest point, shall be fenced or screened in by a six

APPENDIX A—Continued

(6) foot high fence at least eighty percent (80%) opaque at its base.

David J. CABARROCAS, an individual, Plaintiff,

v.

RESOLUTION TRUST CORPORATION as Receiver for New Metropolitan Federal Savings and Loan Association, Defendant.

No. 92-10063-CIV.

United States District Court, S.D. Florida.

Aug. 10, 1993.

Architect brought claim against Resolution Trust Corporation (RTC) as receiver for failed savings and loan association, seeking to foreclose on mechanic's lien against property formerly owned by savings and loan. Architect moved for leave to amend complaint, and RTC moved for summary judgment. The District Court, James Lawrence King, J., held that: (1) proposed amendment to complaint represented additional legal theory and would be allowed; (2) fact questions as to whether contract existed between architect and savings and loan and as to whether architect "improved" property precluded summary judgment; and (3) statutory bar to recovery against RTC as receiver did not preclude liability by RTC for debt allegedly owed to architect by savings and loan.

Motion to amend granted; motion for summary judgment denied.

1. Federal Civil Procedure ⇐824, 2532

Although plaintiff's motion for leave to amend complaint and defendant's motion for summary judgment were both untimely in light of pretrial timetable set by district court, such that case could be dismissed altogether pursuant to local rule, both motions would be addressed, since pretrial conference was postponed by court for independent reasons after receiving motions. U.S.Dist.Ct. Rules S.D.Fla., General Rule 16.1, subd. H.

2. Federal Civil Procedure ⇐842

Plaintiff's proposed amendment to complaint represented additional legal theory more than allegations of fundamentally different facts, and defendant would not be unduly prejudiced by amendment, and thus amendment would be allowed with additional time for discovery.

3. Federal Civil Procedure ⇐2544

Although it is incumbent upon party responding to summary judgment motion to set forth specific facts showing genuine issue for trial, burden on nonmoving party is not heavy one; nonmoving party is required only to show specific facts, as opposed to general allegation, that present genuine issue. Fed. Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

4. Federal Civil Procedure ⇐2544

Party responding to summary judgment motion may not need to introduce affidavit or other evidence to counter motion when moving party has not met its initial burden of establishing absence of disputable material fact. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

5. Federal Civil Procedure ⇐2492

In contract cases, summary judgment may be inappropriate when there is factual dispute regarding existence of valid and binding agreement or as to scope of agreement. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

6. Federal Civil Procedure ⇐2481

Pursuant to Florida mechanic's lien statute, fact issues as to whether contract for architectural services existed between architect and individual under contract to buy real property from failed savings and loan association, whether architectural services contract was attributable to and binding upon savings and loan, and as to whether services performed by architect improved property, pre-

DECISIONS WITHOUT PUBLISHED OPINIONS—Continued

Title	Docket Number	Date of Decision	Disposition	Appeal from and Citation (if reported)
**Mancuso v. City of Jacksonville, FL	93-3072	11/23/94	AFFIRMED	M.D.Fla.
*Oliver v. U.S.	93-3129	11/21/94	AFFIRMED	M.D.Fla.
Hernandez v. Singletary	93-3152	11/15/94	REVERSED AND VACATED	M.D.Fla., 829 F.Supp. 372
*Ilic v. Liquid Air Corp.	93-3332	11/17/94	AFFIRMED	M.D.Fla.
Hudson v. Dept. of Labor	93-3375	11/16/94	AFFIRMED	M.D.Fla.
Malina v Witten	93-3459	11/21/94	REVERSED AND VACATED	M.D.Fla.
*U.S. v. Cuartas	93-4327	11/17/94	AFFIRMED	S.D.Fla.
*U.S. v. Blanco	93-4765	11/17/94	AFFIRMED	S.D.Fla.
*Solermou v. Gladstone	93-4771	11/17/94	AFFIRMED	S.D.Fla.
*Holland v. Willie	93-4960	11/22/94	AFFIRMED	S.D.Fla.
*U.S. v. Jones	93-5002	11/22/94	AFFIRMED	S.D.Fla.
*Leon v. U.S.	93-5038	11/22/94	AFFIRMED	S.D.Fla.
*Gould v. Smith	93-5042	11/17/94	AFFIRMED	S.D.Fla.
*Ringel v. Veterans Admin.	93-5152	11/22/94	AFFIRMED	S.D.Fla.
*/**U.S. v. Hicks	93-5280	11/17/94	AFFIRMED	S.D.Fla.
*U.S. v. Turner	93-5287	11/22/94	AFFIRMED	S.D.Fla.
*Butler v. Richards	93-6180	11/22/94	AFFIRMED	M.D.Ala.
*U.S. v. Bolivar	93-6400	11/22/94	AFFIRMED	S.D.Ala.
U.S. v. Johnson	93-6570	11/23/94	AFFIRMED	S.D.Ala.
*Killough v. Shalala	93-6612	11/21/94	AFFIRMED	M.D.Ala.
**Williams v. Mead Coated Bd., Inc.	93-6987	11/23/94	AFFIRMED	M.D.Ala., 836 F.Supp. 1552
*U.S. v. Perry	93-7029	11/16/94	AFFIRMED	M.D.Ala.
*/**U.S. v. Jordan	93-7049	11/17/94	AFFIRMED	S.D.Ala.
*White v. Morrison	93-7063	11/18/94	AFFIRMED	N.D.Ala.
*U.S. v. Pita	93-8284	11/18/94	AFFIRMED	N.D.Ga.
*King v. Thomas	93-9107	11/21/94	AFFIRMED	N.D.Ga.
*Jordan v. Southwire Co.	93-9124	11/22/94	AFFIRMED	N.D.Ga.
*U.S. v. Bowden	93-9147	11/16/94	AFFIRMED	N.D.Ga.
U.S. v. Batastini	93-9151	11/15/94	REVERSED AND VACATED	N.D.Ga.
*Hamm v. Whitworth	93-9210	11/22/94	AFFIRMED	N.D.Ga.
*U.S. v. Luke	93-9367	11/21/94	AFFIRMED	S.D.Ga.
*U.S. v. Boyce	93-9394	11/16/94	AFFIRMED	N.D.Ga.
*Warren v. Cook	93-9415	11/23/94	AFFIRMED	M.D.Ga.
*Fields v. Thompson	93-9487	11/18/94	AFFIRMED	S.D.Ga.
**U.S. Fidelity v. Whitaker	93-9499	11/21/94	AFFIRMED	M.D.Ga.
*Carroll v. U.S.	93-9528	11/22/94	AFFIRMED	N.D.Ga.
*/**U.S. v. Afila	94-2021	11/16/94	AFFIRMED	M.D.Fla.
**General Longshore v. Pate Stevedore	94-2089	11/23/94	AFFIRMED	N.D.Fla.

* Fed.R.App.P. 34(a); 11th Cir.R. 34-3.

** Local Rule 36 case.

DECISIONS WITHOUT PUBLISHED OPINIONS—Continued

Title	Docket Number	Date of Decision	Disposition	Appeal from and Citation (if reported)
Abbott v. City of Cape Canaveral	94-2135	11/16/94	AFFIRMED	M.D.Fla., 840 F.Supp. 880
*Bankston v. St. Joe Forest Products	94-2467	11/21/94	AFFIRMED	N.D.Fla.
*May v. Bennett	94-4010	11/18/94	AFFIRMED	S.D.Fla.
*/**Carroll v. Carrigan	94-4011	11/21/94	AFFIRMED	S.D.Fla.
*U.S. v. Michael	94-4159	11/22/94	AFFIRMED	S.D.Fla.
*U.S. v. Turner	94-4213	11/22/94	AFFIRMED	S.D.Fla.
*U.S. v. Sessions	94-6028	11/22/94	AFFIRMED	S.D.Ala.
*Jones v. Shalala	94-6046	11/14/94	AFFIRMED	N.D.Ala.
*/**City of Montgomery v. Conley	94-6054	11/14/94	AFFIRMED	M.D.Ala.
*Bostwick v. Morrison	94-6143	11/18/94	AFFIRMED	N.D.Ala.
*/**Trapp v. Unr-Rohn, Inc.	94-6147	11/14/94	AFFIRMED	N.D.Ala.
*King v. City of Dothan Police Dept.	94-6213	11/23/94	AFFIRMED	M.D.Ala.
*/**Cox v. Shalala	94-6215	11/22/94	AFFIRMED	M.D.Ala.
*/**Robinson v. Howard	94-6261	11/22/94	AFFIRMED	M.D.Ala.
*Kirby v. Tennessee Valley Authority	94-6506	11/23/94	AFFIRMED	N.D.Ala.
**Tucker v. DOJ	94-8037	11/15/94	AFFIRMED	N.D.Ga.

* Fed.R.App.P. 34(a); 11th Cir.R. 34-3.

** Local Rule 36 case.